No. 93-1490

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Petitioners,

—v.—

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

Scott A. Rosenberg
(*Counsel of Record*)
Judith Goldiner
The Legal Aid Society
11 Park Place, Room 1805
New York, New York 10007
(212) 406-0745

Paris R. Baldacci
Cardozo Bet Tzedek
Legal Services
55 Fifth Avenue, 17th floor
New York, New York 10003
(212) 790-0240

Frank J. Barbaro
Melissa Cook
211 Kings Highway
Brooklyn, New York 11223

Attorneys for Respondents Janet Goodman, Kairos Rencher, and Disabled-in-Action

William B. Rubenstein
Ruth E. Harlow
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Beatrice Dohrn
Lambda Legal Defense
and Education Fund
666 Broadway
New York, New York 10012
(212) 995-8585

Attorneys for Respondents Robert Wells, Everett Quinton, and Gay Men's Health Crisis, Inc.

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QUESTION PRESENTED

Whether the decision of the New York Court of Appeals correctly held that modifications to New York State's family anti-eviction regulations do not, on their face, effect a physical or regulatory taking.

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INTRODUCTION

Respondents respectfully submit that the petition for a writ of *certiorari* should be denied in this facial challenge to New York State's family anti-eviction amendments. The question presented for review is neither novel nor difficult under this Court's precedents. The decision of the New York Court of Appeals is not in conflict with decisions of this Court, nor is it at odds with holdings in any other jurisdiction. In short, there is no reason for this Court's plenary review.

STATEMENT OF THE CASE

A. History Of The Challenged Amendments

Since the 1920's, New York State has regulated the residential housing market in order to protect tenants from the harms caused by an ongoing shortage of affordable housing. As part of those schemes, known locally as Rent Control and Rent Stabilization, the State has regulated evictions, as well as rents, prohibiting the eviction of family members on the death or departure of the tenant of record during an ongoing housing shortage.[1] In July 1989, the New York State Court of Appeals held that the family anti-eviction protections codified in New York City's rent control regulations should be extended to families related other than by

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[1] Under Rent Control, co-residing family members related by blood, marriage or adoption were protected from eviction on the death or departure of the tenant. 9 N.Y.C.R.R. §2204.6(d)(McKinney Uncon. 1987). Under Rent Stabilization, an expansive list of family members were protected from eviction: husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law. 9 N.Y.C.R.R. §2520.6(o)(McKinney Uncon. 1987). Continuation of these protections is dependent on periodic legislative recertification that a housing shortage persists. *See* n.10, *infra*.

blood or marriage. The Court held that,

> [t]he intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.

Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211 (1989). The Court also provided indicia by which to determine

> whether an individual is entitled to nonevictionprotection . . . based upon an objective examination of the relationship of the parties . . . . including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.

Id. at 212-13 (citations omitted).

On November 8, 1989, the New York State Division of Housing and Community Renewal ("D.H.C.R.") codified *Braschi* in a series of amendments to the existing family anti-eviction regulations.[2] D.H.C.R. determined

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[2] 9 N.Y.C.R.R. §2204.6(d)(McKinney Uncon. Supp. 1993), New York City's Rent [Control] and Eviction Regulations ("Rent and Evic. Regs."); 9 N.Y.C.R.R. §§2520.6(o) and 2523.5(b)(McKinney Uncon. Supp. 1993), New York City Rent Stabilization Code ("R.S.C."); 9 N.Y.C.R.R. §2104.6(d)(McKinney Uncon. Supp. 1993), New York State Rent and Eviction Regulations (rent control outside of New York City); and 9 N.Y.C.R.R. §§2500.2(m) and 2503.5(d)(McKinney Uncon. Supp. 1993), Emergency Tenant Protection Regulations ("E.T.P.R.")(rent stabilization outside of New York City). These amendments were made immediately effective on an emergency basis pursuant to N.Y.S.A.P.A. §202(6)(McKinney Supp. 1994) in order to prevent the eviction of family members prior to the final enactment of (continued...)

that there were close family members, related by other than blood, marriage or adoption, who were not protected by the prior regulations and who faced eviction from their homes on the departure of the named tenant unless the regulations were amended. Record on Appeal below, Vol. II, pp.133, 140, 148, 155; Vol. IV, pp.1826, 1849, 1873, 1895. Further, the plight of two groups who frequently live in such families not protected under the prior regulations -- poor people and persons with AIDS -- dramatically highlighted for D.H.C.R. the need for the amendments. Record on Appeal below, Vol. II, pp.137-39, 145-47, 152-54, 159-61, 162-73. The agency noted:

> The decision in the *Braschi* case which involved a tenant who died of AIDS, underscored the reality that the definition of a family in America has changed dramatically in the 1970's and 1980's. Gay couples, de facto marriage, single parent households and many other living arrangements are no longer exceptional, especially in New York City . . . . Thus, at a minimum, about one out of every nineteen of the City's 935,373 rent stabilized households will be affected by these . . . rules, which are intended to clarify a non-traditional family member's right to remain in his or her home, particularly at a time when a significant percentage of these households are vulnerable to the AIDS epidemic.

Record on Appeal below, Vol. II, pp.138-39. *See also, e.g.*, Vol. II, pp.144-47, 152-54, 159-61, 163-64, 169-70, 172-73.

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[2] (...continued)
the permanent amendments. Record on Appeal below, Vol. II, pp. 118-73; Transcript on Appeal below, pp.105-06.

In order to protect such families from eviction, D.H.C.R. amended the definition of "family" in the relevant regulations by incorporating the objective factors set forth in *Braschi* to identify such persons. The agency also provided examples of the categories of evidence by which such families might establish their claim. Record on Appeal below, Vol. II, pp.19-32.[3] Besides the modification in the definition of family, D.H.C.R. also harmonized the required period of co-residency necessary for a family member to claim anti-eviction protection under all of the applicable regulatory schemes. Record on Appeal below, Vol. IV, p.1837. This modification provided that a family member who has lived with a tenant in an apartment for at least two years as her primary residence, one year if disabled or elderly, has made that apartment her family home, from which she should not be evicted on the departure of the tenant, irrespective of whether the tenant dies or vacates the apartment.

B. Procedural History

On November 13, 1989, five days after the amendments were promulgated, petitioners commenced this facial challenge. The complaint alleged that the amendments were promulgated *ultra vires*, that they violated a host of state statutes, and that they effected, on their face, a physical and regulatory taking. However, the complaint contained no specific allegation of any landlord's loss of income or regarding any hardship effected by the amendments, much less a claim that the amendments denied petitioners all productive or economically beneficial use of their property. Immediately following the commencement of this action, the nongovernmental respondents -- individual tenants and organizations representing disabled, elderly, poor, gay and lesbian family members -- joined the lawsuit as defendant-intervenors

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[3] *See* Pet. at 4-5 for text of amendments.

to protect their interests in the protections afforded by the modifications to the family anti-eviction regulations.

Petitioners obtained a temporary restraining order ("T.R.O.") against the emergency implementation of the challenged regulations. Record on Appeal below, Vol. II, pp.46-117, 220-59. The permanent amendments to the regulations became effective on or about March 20, 1990, pursuant to N.Y.S.A.P.A. §202(6)(b)(McKinney Supp. 1994). Record on Appeal below, Vol. IV, p.1738.[4] On April 18, 1990, the trial court extended the temporary restraining order to the permanent amendments. Transcript on Appeal below, pp.303-08; Record on Appeal below, Vol. II, p.44.

On December 4, 1990, the appellate division, deeming the temporary restraining order to be a preliminary injunction, unanimously vacated the injunction. The appellate division rejected all of petitioners' statutory claims. The court also held that the challenged amendments did not effect a forced, permanent physical invasion of property and that petitioners were unlikely to be able to demonstrate that the amendments did not substantially advance the stated purpose of the amendments. *Rent Stabilization Assoc. v. Higgins*, 164 A.D.2d 283 (1st Dep't 1990); App. C.

By an order entered November 27, 1991, the trial court, on the authority of the appellate division's decision, granted summary judgment to defendant D.H.C.R. and defendant-intervenors. App. D. On January 12, 1993, the appellate division unanimously affirmed the

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[4] Petitioners' proposed order to show cause, seeking to bring on a motion to hold D.H.C.R. in contempt for allegedly promulgating the permanent amendments in violation of the T.R.O., was denied by the trial court. Record on Appeal below, Vol. II, p.44. Petitioners' appeal of that denial was dismissed as moot by the appellate division. *Rent Stabilization Assoc. v. Higgins*, 164 A.D.2d 283, 299 (1st Dep't 1990); App. C, p.37a.

lower court's decision upholding the validity of the permanent amendments. 189 A.D. 2d 592 (1st Dep't 1993); App. B. The appellate division specifically held that, "[e]ven under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (*see Nollan v. California Coastal Commission*, 493 U.S. 825, 834)." App. B, p.19a.

On December 21, 1993, the New York State Court of Appeals unanimously held that the amendments do not constitute a physical or regulatory taking. 83 N.Y.2d 156 (1993), App. A. The court of appeals found that "there is a close causal nexus between the challenged regulations and the stated purpose of preventing eviction . . . ." App.A, p.14a. The court of appeals also rejected petitioners' argument that the amendments create "perpetual tenancies," holding that "[a]n owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected . . . ." *Id.* at p.11a.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED SINCE THE DECISION OF THE NEW YORK STATE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS OR ANY OTHER COURT

"This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulations entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 456 U.S. 419, 440 (1982); *see, e.g., Block v. Hirsh*, 256 U.S. 135 (1921)(upholding New York's rent and eviction controls because of housing shortage); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922)(same); *Bowles v. Willingham*, 321 U.S. 503 (1944)(upholding national rent controls because of hous-

ing shortage); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948)(same); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987)(commercial rent controls); *Pennell v. City of San Jose*, 485 U.S. 1 (1988)(municipal rent controls); *Yee v. Escondito*, 503 U.S. __, 112 S.Ct. 1522 (1992)(municipal rent and eviction controls). Petitioners do not challenge in this case the constitutionality of rent regulation itself, nor the legislative findings that a continuing housing shortage exists in New York City and State. Nor do petitioners challenge the validity of the previous family anti-eviction regulations. Rather, the only claim that petitioners press is that the 1989 modification of the definition of family, on its face, constitutes an unconstitutional physical and regulatory taking. Petitioners do not claim that this modification has been applied to their property.

The challenged amendments are unexceptional regulations of the landlord-tenant relationship of the sort long upheld by this Court. This Court should refuse petitioner's request to review this settled area of rent and eviction regulation[5] since, as demonstrated below, the decision of New York State's highest court upholding the facial validity of the regulatory amendments does not conflict with applicable decisions of this or other courts.

Petitioners seek *certiorari* of the court of appeals' decision under this Court's Rule 10.1(c), arguing that the decision below conflicts primarily with the decision of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and also with the decision in *Yee v. City of Escondito*, 112 S.Ct. 1522. Pet. at 6-7, 25-28.[6]

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[5] Indeed, this Court previously refused to review New York's family anti-eviction regulations. *Cohen v. Berger*, 153 A.D.2d 920 (1st Dep't 1989), *appeal denied*, 75 N.Y.2d 809 (1990), *cert. denied*, 499 U.S. 962 (1991).

[6] In the section of the petition entitled "Reasons for Granting the Writ," Pet. at 7, petitioners also attempt to rely on Rule 10.1(b), but (continued...)

The court of appeals' decision conflicts with neither decision. The New York Court of Appeals, adopting the nexus test set forth in *Nollan*, correctly rejected petitioner's regulatory taking claim.[7] *See* Part A, *infra*. The court also appropriately rejected petitioners' physical taking claim based on the principles enunciated in *Yee*. *See* Part B, *infra*. Therefore, petitioners are unable to meet their burden under Supreme Court Rules 10.1(b) and (c) of demonstrating that there exists "a real or 'intolerable' conflict in the same matter of law or fact" between the decision of the court of appeals and this Court's precedents or the application of those precedents by other courts. Stern, Gressman, Shapiro & Geller, *supra* n.7, at 167. Their petition should be denied.

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[6] (...continued)
in fact can point to no decision of another state court of last resort or United States court of appeals that conflicts with the court of appeals' decision. The cases relied upon by petitioners, only one of which is a rent regulation case, simply reiterate *Nollan*'s holding that a nexus must be demonstrated between the regulation and its stated purpose. Pet. at 7. In the one rent regulation case cited, *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575, 583 (9th Cir. 1991), the court found that the *Nollan* nexus test was met even if only one of two proffered purposes supporting vacancy control provisions, *i.e.*, "protecting incumbent residents," was established. The court of appeals' decision in this case does not conflict with any of these decisions. Not surprisingly, then, petitioners do not press this argument as a basis for the writ in the sixteen-page argument section of the petition.

[7] Indeed, the heart of petitioners' argument is simply that the court of appeals erred in applying the *Nollan* test to the specific facts presented by the anti-eviction amendments, not that the court rejected the *Nollan* standard. Pet. at 6-7. Thus, what petitioners actually seek is a fourth level of review of their facial regulatory taking claim, which was unanimously and correctly rejected three times below. However, even if petitioners' claim of misapplication were correct, "[i]t has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 193 (7th ed. 1993), and cases cited therein; *see, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

A. The New York State Court Of Appeals' Decision Does Not Conflict With The Nexus Test Enunciated In *Nollan*

In *Nollan*, this Court held that a regulation may effect a regulatory taking if it does not "substantially advance" the state interest underlying the regulation. 483 U.S. at 834.[8] Thus, the *Nollan* Court required that there

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[8] In this facial challenge, petitioners do not base their regulatory takings challenge on a claim that the amendments on their face deny them all productive or economically beneficial use of their property. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. __, 112 S. Ct. 2886 (1992). Indeed, under the amendments the landlord continues to collect the same rent he or she would collect if the successor tenant were one permitted to succeed to the tenancy under the former regulations, which are not challenged here. In either case, the landlord's only conceivable "loss" is the maximum profit provided by a vacancy increase. App. A, p.6a. However, this Court's "cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 508 U.S. __, __, 113 S.Ct. 2264, 2290 (1993). In any event, the challenged amendments do not disturb the provisions of the rent regulation schemes which guarantee a reasonable return on a landlord's property. Rent Stabilization Law ("R.S.L.") §26-510(c)(McKinney Uncon. 1987); R.S.C. §§2522.2, 2522.4(a)(1) and (4), 2522.4(a)(2), 2522.5(d)(1); Rent and Evic. Regs. §§2202.3, 2202.4, 2202.5, 2202.7, 2202.10, 2202.11, 2202.12. If a landlord's economic return is reduced below a reasonable level, regulations permit the landlord to apply for a rent increase (R.S.C. §2522.4[b] and [c]; Rent and Evic. Regs. §2202.7, 2202.8), or even to withdraw the building from the rental market (R.S.C. §2524.5 [a][1]; Rent and Evic. Regs. §2204.9), or to demolish the building (R.S.C. §2524.5[a][2]; Rent and Evic. Regs. §2204.8); *see also* App. A., p.6a. Thus, contrary to petitioners' claim, the issue considered premature in *Pennell v. City of San Jose*, 485 U.S. 1, is also not presented by this case. Pet. at 22-23. In *Pennell*, the regulation at issue permitted a hearing officer to reduce the regulated rent below a "reasonable return" if the higher rent would cause tenant hardship. *Id.* at 8-10. Indeed, as in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a landlord's "primary expectation" as a lessor of residential property in New York State's heavily regulated market is not significantly limited by the challenged amendments. The amendments "not

(continued...)

be an "essential nexus" between the regulation and the "end advanced as [its] justification." *Id.* at 837. Petitioners acknowledge that the court of appeals adopted the *Nollan* nexus test as the appropriate standard by which to review petitioners' facial regulatory takings claim. Pet. at 6 and 17. The court of appeals also applied *Nollan*'s heightened scrutiny standard to evaluate the fit between the amendments and the legitimate state purpose which they are meant to serve.[9] Thus, there is no conflict between the court of appeals and this Court regarding the applicable standard of review in this case.

However, petitioners seek to manufacture a conflict by mischaracterizing the stated purpose for the challenged amendments, which was to protect families from eviction from their homes during a housing shortage, and then quibbling with the court of appeals' findings regarding the "essential nexus" between that purpose and the effects of the amendments. As demonstrated below, the court of appeals appropriately determined that the stated purpose of the amendments was to protect families related other than by blood or marriage from eviction during

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[8] (...continued)
only permit[ ] but contemplate that [petitioners] may continue to use [their] property precisely as it has been used . . . . [and] also to obtain a 'reasonable return' on their investment." *Id.* at 136. In any event, petitioners in this facial challenge have never presented a single case in which the application of the amendments has resulted in a landlord's being denied beneficial use of his or her property or a reasonable return.

[9] *Nollan* was an as applied challenge to a regulation that conditioned the grant of a building permit upon the applicant's agreeing to an easement allowing the public physical access to his property. The *Nollan* Court's discussion of the proper standard of judicial review may be limited to such physical exactions or conditioned benefits cases. In any event, the court of appeals applied *Nollan*'s heightened scrutiny standard to the amendments challenged in this case.

an ongoing housing shortage and that the amend ments directly and substantially accomplish that stated purpose.

The challenged amendments modify existing family anti-eviction regulations[10] in response to the court of appeals' decision in *Braschi*, which extended such protections under rent control to "households having all the normal familial characteristics . . . . [of] dedication, caring, and self-sacrifice . . . ." 74 N.Y.2d at 211-13. App. A, pp.4a-6a; *see* pp.1-4, *supra*. Given this regulatory history, the court of appeals appropriately concluded that D.H.C.R.'s stated purpose for promulgating the challenged amendments was, as D.H.C.R. had claimed in this action, to prevent the eviction of a narrow class of family members that had not been included in the existing family anti-eviction regulations by "clarify[ing] a non-traditional family member's right to remain in his or her home." App. A, p.5a.

The court of appeals also found that D.H.C.R.'s amendments directly served their stated purpose by cod-

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[10] Petitioners do not challenge the validity of the existing family anti-eviction regulations, which protect an expansive list of family members. *See* n.1, *supra*. Those regulations previously had been upheld by New York's courts as "effectively advanc[ing]" and "essentially accomplish[ing]" the public policy enunciated in the rent and eviction laws, *i.e.*, preventing the dislocation of resident tenant families during a housing shortage. *Festa v. Leshen*, 145 A.D.2d 49, 56-57, 62 (1st Dep't 1989), cited approvingly by the *Rent Stabilization Association* court, App. A., p.3a; *see also Cohen v. Berger*, 153 A.D.2d 920. Nor do petitioners challenge New York State's legislative findings confirming an ongoing housing shortage and reaffirming the long-standing public policy of protecting the citizens of New York State against disruptive eviction practices during this housing crisis. *See, e.g.*, 1993 N.Y. Laws, Ch. 253; Emergency Housing Rent Control Law §8581 (McKinney Uncon. 1987 and Supp. 1993); N.Y.C. Rent Control Law, Adm. Code §26-401 (McKinney Uncon. 1987); R.S.L. §26-501 (McKinney Uncon. 1987); Emergency Tenant Protection Act §8622 (McKinney Uncon. 1987). Indeed, the court of appeals particularly noted this legislative and regulatory history in determining the anti-eviction purpose underlying the challenged amendments. App. A, pp. 4a-5a.

ifying the factors previously enunciated in *Braschi*, 74 N.Y.2d at 212-13, for identifying family relationships entitled to anti-eviction protection. App. A, 4a-5a. Thus, the court of appeals concluded that the direct result of the amendments was to protect only the "intended beneficiaries" of the amendments, *i.e.*, families "who would, absent the regulations, be threatened with eviction from their homes . . . [,]" *id.* at p.14a, yet who, because of the closeness of their relationship and the length of time they had lived together, had more than made the apartment their "family home" and, thus, were equally deserving of protection from eviction.

Unlike the regulation in *Nollan*, which granted physical access to the ocean-front even to those who would suffer no harm from the proposed building, the D.H.C.R. amendments prevent the eviction only of family members who can demonstrate a close financially and emotionally committed relationship with the tenant of record, and who resided with the tenant in the apartment for the required co-residency period.[11] Nor do the

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[11] Petitioners misrepresent the heavy burden placed on family members claiming anti-eviction protections under the amendments' functional definition. Pet. at 17 n.6. The amendments, by their plain language and as they have been applied by New York courts, do not protect "practically *any* financially interdependent group of friends[,]" *id.* (emphasis in original), or "*[a]ny occupant* . . . [who] has resided in the apartment for two years or less." *Id.* at 15 (emphasis in original). Rather, the courts have required objective proof of a close financial and emotional interdependence evidencing an intention of creating a long-term committed relationship. 9 N.Y.C.R.R. §2204.6[d][3][i], §2520.6[o][2]; *see, e.g.*, cases cited by petitioners, Pet. at 23; *see also* cases in which state courts have rejected family members' claims, *Blaser v. Campbell*, N.Y.L.J., June 10, 1992, at 25, col. 1 (Civ.Ct. N.Y. Co.)(family relationship claim rejected); *Park Holding Co. v. Power*, N.Y.L.J., Jan. 17, 1992, at 26, col. 1 (App. Term, 1st Dep't)(gay life partner claim rejected on remand from 161 A.D.2d 143 [1st Dep't 1991]), *leave to appeal granted*, 584 N.Y.S.2d 506 (App. Div. 1st Dep't 1992); *Ramirez v. Lewis*, 177 A.D.2d 296 (1st Dep't 1991)(heterosexual (continued...)

amendments seek to "offset" a harm through an unrelated benefit, as did the regulation struck down in *Nollan*. Instead, the amendments directly prevent the very harm -- eviction at will from one's family home by a landlord during a housing shortage -- which justifies the imposition of the regulation upon the rental market.[12] In addition, unlike the regulation in *Nollan*, the amendments in this case go no further than absolutely necessary to protect families who meet the regulatory standards. The amendments do not affect, for example, landlords' rights under traditional real property law and the Rent Control and Rent Stabilization systems to terminate a tenancy if the tenant fails to pay rent or commits a nuisance, engages in illegal acts, or breaches the lease or some other substantial obligation of the tenancy.[13]

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[11] (...continued)
life partner claim rejected); *Parcel 242 Co. v. Heitner*, N.Y.L.J., Aug. 29, 1990, at 22, col. 2 (Civ.Ct. N.Y. Co.)("granddaughter" claim rejected); *114153 Owners v. D'Amura*, N.Y.L.J., Nov. 9, 1989, at 23, col. 2 (Civ.Ct. Kings Co.)(heterosexual life partner claim rejected).

[12] Accordingly, petitioner's claim that the amendments unfairly single out landlords to cure social ills they did not create is without merit. Pet. at 20-22. The ill the regulation addresses, dislocation of families from their family homes during a housing shortage, occurs only if the landlord -- who has voluntarily entered the regulated housing market, *see Yee*, 112 S.Ct. at 1528 -- is permitted to evict such families. As noted above, this Court has consistently upheld the right of states to limit evictions under such circumstances. *See* cases cited *supra*, pp.6-7, *e.g.*, *Block*, 256 U.S. at 154-55; *Levy*, 258 U.S. at 245; *cf. Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part, dissenting in part)("Singling out landlords [for regulation] . . . may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem").

[13] R.S.C. §2524.3; E.T.P.R. §2504.2; Rent and Evic. Regs. §2104.2, §2204.2. Similarly, the landlord can commence a "personal use holdover" to regain possession of the apartment for his own or his immediate family's residential use, except where the tenant is elderly, dis- (continued...)

Petitioners further claim that the court of appeals' decision conflicts with the *Nollan* nexus requirement because the amendments do not increase the housing supply or resolve the problems of homelessness, poverty or AIDS is misplaced. Pet. at 16. As shown above, the solution of these pervasive and intractable social problems was not the stated purpose of the challenged amendments. Rather, their purpose was to extend to families related other than by blood or marriage the same protection from the hardship and suffering inflicted by eviction from one's family home during a housing shortage as was provided to families related by blood and marriage by the prior regulations. The agency had simply referenced such social problems as the context in which it had come to recognize the existence and plight of families that had not been included within the prior regulations' anti-eviction protections. *See* pp.2-4, *supra*. Petitioners did not dispute below that such families exist or that they faced summary eviction from their rent-regulated family homes on the death or departure of the tenant of record.[14]

However, the amendments were intended to protect not only families facing AIDS, homelessness or poverty; rather, they were intended to protect all families who

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[13] (...continued)
abled, or has resided in the apartment for at least 20 years, R.S.C. §2524.4(a); E.T.P.R. §2504.4(a); Rent and Evic. Regs. §§2104.5 and 2204.5. Various regulations also permit landlords to recover possession for purposes of withdrawing a unit from the rental market, R.S.C. §2524.5(a)(1); E.T.P.R. §2504.4(b); Rent and Evic. Regs. §§2104.9 and 2204.9; for purposes of demolition, R.S.C. §2524.5(a)(2), Rent and Evic. Regs. §§2104.8 and 2204.8; or on "other grounds." R.S.C. §2524.5(a)(3); E.T.P.R. §2504.4(c).

[14] *See, e.g.*, cases cited in *Braschi*, 74 N.Y.2d at 213. Indeed, the very reason petitioners challenge the amendments is because they wish to evict such family members.

can demonstrate a close emotional and financial interdependence, and the required period of co-residency in the apartment. Thus, petitioner's complaint that the amendments contain no income, AIDS, age, disability, lack of alternative housing, or any other threshold test is misplaced. Pet. at 16. Given the broad purpose of the amendments, such limitations are not required by *Nollan*. In addition, neither rent regulation itself nor the prior family anti-eviction regulations, which are not challenged by petitioners and which are premised on the same governmental purpose of protecting families from eviction during a housing shortage, have such tests. Thus, the amendments simply seek to extend to other close families the same protections which had previously been afforded only to families related by blood or marriage.[15] Contrary to petitioners' assertions, therefore, there is no conflict with *Nollan* and no basis for plenary review.

B. The State Court of Appeals' Decision Does Not Conflict With This Court's Decision In *Yee*

In *Yee*, this Court rejected a physical taking challenge to a California ordinance which imposed limitations on landlords far more severe than the definitional

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[15] This Court has consistently sustained the constitutionality of provisions of law, like the ones challenged here, with clearly defined means-end relationships. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (direct effect of saving a landmark); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987)(prevented public health hazards caused by mining); *Andrus v. Allard*, 444 U.S. 51 (1979)(protected endangered species by prohibiting unrestricted sale of parts). Indeed, the *Nollan* Court had noted that the challenged regulation in that case would have been upheld had the limitation imposed by it "protected the public's ability to see the beach [the stated governmental interest] notwithstanding construction of the new house." 483 U.S. at 836.

modifications at issue in this case. The ordinance in *Yee* permitted tenant mobile home owners to sell their homes in place on the landowner's property to "strangers" without the landlord's consent and to reap a profit from that sale.[16] Applying the settled principle that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," 112 S.Ct. at 1528 (emphasis in original), *Yee* held:

> [The ordinance] authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by government.

Id. (citation omitted). Accordingly, the *Yee* Court held that where landlords "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 1530 (citations omitted).

The court of appeals, relying on *Yee*, found that the challenged amendments did not coerce a landlord in the first instance to rent his or her property. Further, the court of appeals found that the challenged amendments impose an even heavier burden on persons seeking to succeed to a tenancy than is required by *Yee*. The amendments require that the successors to the tenant's lease must demonstrate a close, familial connection to

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[16] Plaintiffs in *Yee* did not challenge ordinary rent regulations, such as are at issue in this case. "Instead, their argument [was] predicated on the *unusual economic relationship* between the park owners and mobile home owners." 112 S.Ct. at 1528 (emphasis added)(citations omitted).

the tenant and a period of co-residency in the apartment. App. A., p.12a.

Nevertheless, petitioners claim that the court of appeals' decision is in conflict with *Yee* since landlords "cannot unilaterally decide to go out of the rental business, but instead must meet specified statutory criteria before they can evict their tenants and withdraw their properties from the rental market." Pet. at 25-26. However, the *Yee* Court rejected this very argument in the landlords' facial challenge in that case:

> Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice "a kind of gauntlet," in that they are not in fact free to change the use of their land. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how that procedure has been applied to petitioner's property, and we accordingly confine ourselves to the face of the statute.

112 S.Ct. at 1528-29 (citations omitted). Similarly, in this facial challenge, petitioners do not claim to have pursued the numerous opportunities under the statutory scheme for terminating tenancies or changing the uses of their properties.[17] Thus, the amendments protecting fam-

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[17] *See* n.13, *supra*. On similar grounds, the *Yee* Court found that an as applied regulatory taking claim was not ripe since the landlords did not claim that the regulations at issue in that case had been applied to the landlords' property, depriving them of its economically beneficial use. *Yee*, 112 S.Ct. at 1531-32. Here, too, petitioners' facial challenge does not allege any application of the amendments to their property or any constitutionally prohibited economic harm. *See* n.8, *supra*. Thus, petitioners' reliance on *dicta* in *Yee*, which is arguably applicable to an as applied regulatory takings claim, is misplaced in this facial challenge. Pet. at 15-16. In addition, their reliance on the concurrence's comments in the decision below regarding future as applied challenges is also misplaced in this facial challenge. Pet. at 11.

ilies from eviction do not "on their face . . . compel a landowner over objection to rent his property [in the first instance] or to refrain in perpetuity from terminating a lease." *Id.* at 1529.[18]

Accordingly, there is no conflict between the decision of the New York State Court of Appeals in this case and the decision of this Court in *Yee*.

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[18] Petitioners' reliance on regulatory provisions that protect elderly and disabled tenants, or tenants who have resided in an apartment for at least twenty years or more, from being evicted solely for the owner's use is unavailing. Pet. at 25-26. Those provisions, which pre-date the challenged amendments, were not challenged below. In any event, they do not create a tenancy "in perpetuity," but merely protect the tenancy for the life of the protected tenant. Nor is the landlord prohibited from terminating the tenancy of such persons on any of the numerous other bases provided for in the statutory schemes. See n.13, *supra*.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

Scott A. Rosenberg
(*Counsel of Record*)
Judith Goldiner
The Legal Aid Society
11 Park Place, Room 1805
New York, NY 10007
(212) 406-0745

Paris R. Baldacci
Cardozo Bet Tzedek
Legal Services
55 Fifth Avenue, 17th floor
New York, NY 10003
(212) 790-0240

Frank J. Barbaro
Melissa Cook
211 Kings Highway
Brooklyn, NY 11223

Attorneys for
Respondents
Janet Goodman,
Kairos Rencher, and
Disabled-in-Action

William B. Rubenstein
Ruth E. Harlow
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

Beatrice Dohrn
Lambda Legal Defense
and Education Fund
666 Broadway
New York, NY 10012
(212) 995-8585

Attorneys for
Respondents
Robert Wells,
Everett Quinton, and
Gay Men's Health
Crisis, Inc.

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